Editor's note: Reconsideration denied by orders dated April 8, 1980 and May 29, 1980: **Appealed - aff'd Civ.No. 80-951 WEC (D.Ariz.), aff'd, No. 82-5248 (9th Cir. Dec. 17, 1982)**

UNITED STATES
v.
LUDWIG G. ROSENKRANZ

IBLA 79-230 Decided February 29, 1980

Appeal by contestee from a decision by Administrative Law Judge Harvey C. Sweitzer declaring Lazy Doc lode mining claim null and void. Arizona 8461.

Affirmed as modified.

1. Mining Claims: Discovery: Generally

   A discovery of valuable mineral exists where the claim contains mineralization of sufficient quality and quantity to justify further expenditure of labor and means, with a reasonable prospect of success in developing a valuable mine.

2. Administrative Procedure: Burden of Proof -- Evidence: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally

   When the Government contests a mining claim on a charge of lack of discovery, the Government has the burden of proving a prima facie case; the burden then shifts to the mining claimant to prove by a preponderance of the evidence that discovery exists.

3. Mining Claims: Discovery: Generally

   Minute amounts of mineralization may justify further exploration without establishing discovery.

4. Mining Claims: Discovery: Generally

Discovery of gold sufficient to validate a mining claim must be made on the claim itself, despite gold discovery on land nearby which might induce a reasonable prospector to continue searching for a valuable mineral deposit on the claim.

5. Evidence: Generally -- Hearings -- Mining Claims: Hearings

Evidence submitted on appeal after an initial decision in a mining contest may not be relied upon in making a final decision but may only be considered to determine if the hearing should be reopened.

APPEARANCES: Ludwig G. Rosenkranz, pro se.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Ludwig G. Rosenkranz appeals the January 19, 1979, decision in which Judge Sweitzer declared his Lazy Doc lode mining claim 1/ null and void for lack of discovery of a valuable mineral deposit. Appellant has an application for patent pending. The contest complaint, initiated by the U.S. Bureau of Land Management at the request of the U.S. Forest Service, charged that there was no discovery of a valuable mineral deposit on the claim. Judge Sweitzer agreed, after a prehearing conference and hearing.

On appeal, contestee alleged that Government agents repeatedly showed bad faith, attempted to discredit his claim, and that efforts to remove and sell overburden were blocked. He maintained that treatment of his claim was unnecessarily severe. He disputed Government sampling, argued that neighboring discoveries by geologic inference indicated gold on his claim, and asserted that recent gold price increases should render his claim marketable. Above all, appellant alleged that the mining laws were improperly applied to his situation. He particularly objected to the use of the marketability test over the old "prudent man" test.

1/ The Lazy Doc lode mining claim was located by the contestee November 27, 1946, recorded December 10, 1946, and amended and rerecorded November 7 and 8, 1947. The claim is situated in the NW 1/4 sec. 30, T. 2 N., R. 9 E., Gila and Salt River meridian, Maricopa County, Arizona, in the Goldfield Mining District within the Tonto National Forest.

[1] As Judge Sweitzer pointed out in his decision, the existence of gold on the claim was not at issue. Instead, the contest disputed the extent of that mineralization, i.e., whether sufficient mineralization existed to satisfy the "prudent man" test. This test dictates that in order for a mining claim to be valid, the claim must contain a mineral deposit of such quantity and quality as to justify a person of ordinary prudence in further expenditure of time, labor, and means in the development of a paying mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313, 322 (1905). Incorporated in the "prudent man" test is the concept of marketability. It must appear to a prudent person that the material may be mined, removed, and marketed at a profit. Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

[2] Once the Government contests a mining claim on a charge of no discovery, the Government must meet the initial burden of making its prima facie case. This burden is met where, as here, a Government mineral examiner samples a claim and gives his expert opinion that no discovery exists on the claim. United States v. Bechthold, 25 IBLA 77 (1976). Once this prima facie case is established, the burden shifts to the mining claimant to show by a preponderance of the evidence that a discovery has been made within the limits of the claim. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Ross, 40 IBLA 169 (1979).

The record does not indicate bad faith on the part of the Government's mineral examiners.

Judge Sweitzer considered the hearing testimony as follows:

> Mr. Gilbert Matthews, a mining engineer employed by the Forest Service, took samples from the Lazy Doc, had the samples assayed, and otherwise examined the claim. He made several trips to the claim and on two occasions was accompanied by Raj Daniel, a mineral examiner employed by the Forest Service. No sampling was done when Mr. Daniel was present but he examined the claim noting where samples had been taken and examined the assay reports. Mr. Matthews and Mr. Daniel each testified that in his opinion a prudent man would not be justified in spending time and money with a reasonable hope of developing a paying mine on the Lazy Doc. In their testimony, both commented on the spotty nature of the mineralization and the narrowness of the vein each had observed.
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> In consideration of the testimony of Mr. Matthews and Mr. Daniel, both of whom were shown to be qualified mineral examiners, I find the Contestant established a prima facie case. See United States v. Ramsey, 14 IBLA 152, 154 (1974), United States v. Blomquist, 7 IBLA 351 (1972).

Although Contestee contends Mr. Matthews was biased and that Mr. Daniel's testimony should be stricken because he was not present when ore samples were actually taken, no bias is established and the testimony of both witnesses was probative and shown to be reliable.

The evidence offered by Contestee consists of opinions that extensive mineralization exists on the claim and that low costs of conducting a mining operation on the claim would be such that it should be concluded a profit could result. I find the evidence relating to mineralization to be speculative and based on geologic inference, and that the evidence relating to production is not credible.

Contestee presented evidence that the presence of "slickensides" on the claim constitutes "very, very wonderful things for ore and depth." (Tr. 53) Contestee also had assays of samples showing mineral values but was unable to show when or how the samples were taken. (See Tr. 84-88.) Such evidence does not suffice for Contestees' case. See United States v. Henault Mining Company, 73 I.D. 184 (1966), aff'd, Henault v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); United States v. Ramsher Mining and Engineering Company, Inc., 13 IBLA 268 (1973).

The Contestee or his lessees have been on the claim since 1946 and the work performed during this period of more than 30 years is substantial, but there has been no processing or sale of any ore. Such mineral as has been removed has been left on or near the claim. Clearly, there has been ample time for the development of a mine. What persons have done is much more persu[a]sive evidence than what a witness is willing to state that a prudent man would do. [2/] United States v. Flurry, A-30887 (March 5, 1968).

2/ In his concurrence hereto, Judge Fishman questions this sentence. I agree that the sentence goes too far -- the sentence would indicate that it is virtually impossible to prove a discovery if there has been no development of the claim. While lack of development over a considerable period raises a presumption of no discovery, such a presumption may be rebutted by persuasive evidence. United States v. Hess, 46 IBLA 1 (1980). To this extent, the Administrative Law Judge's opinion is modified. The presumption of lack of discovery applies regardless of whether a precious mineral is involved. United States v. Hess, supra.

> It would appear from the evidence presented that the geology of the claim might warrant further exploration but a valuable mineral deposit has not been found simply because continued exploration of the claim might be warranted. United States v. McClurg, 31 IBLA 8, 11 (1971); United States v. Taylor, 25 IBLA 21, 25 (1976).
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> A prima facie case of no discovery having been made and Contestee having failed to establish the existence of a discovery by a preponderance of the evidence, a conclusion that the contested mining claim is invalid is required.
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> Therefore, pursuant to the prayer of the complaint, the captioned mining claim is declared null and void for the reason that no valuable mineral deposit has been discovered within the limits of the claim.

Decision at 2-3.

[3] Minute amounts of mineralization may justify further exploration to demonstrate the feasibility of development, without establishing discovery. Chrisman v. Miller, supra; United States v. Robinson, 21 IBLA 363, 82 I.D. 414 (1975). Samples must be representative of the mineral deposit to be meaningful. United States v. Bechthold, supra. Appellant was unable to establish that here, after ample opportunity to find and present evidence of sufficient mineral deposits to prove discovery.

[4] Discovery of gold sufficient to validate a mining claim must be made on the claim itself, despite discovery of gold on neighboring lands. Nearby discoveries might induce a reasonable prospector to continue searching for a valuable mineral deposit on the claim, but such discoveries are hardly conclusive of discovery on this claim. Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 622, 624 (9th Cir. 1977); United States v. McHenry, 43 IBLA 122 (1979). While geologic inference may be used to establish mineral character of a claim, United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972), it is discovery rather than mineral character which is at issue here. It was on the basis of lack of discovery that the claim was held to be null and void by the Administrative Law Judge. Regardless of recent increases in the price of gold, appellant has not made sufficient showing of quantity to prove a discovery of sufficient value to warrant issuance of a patent.

[5] On October 9, 1979, appellant submitted statements from Stanley B. Keith, geologist; Robert T. O'Haire, mineralogist; and David D. Robb, mining engineer. All concurred in the following evaluation:

> Based on the data I was shown any statement that the Lazy Doc Lode is non-mineral in character violates the weight of the data. Many of the assays tickle 1 oz/Ton which at todays price of gold (is 340.00 per oz. as of 09/11/79) is nothing to take lightly. The geologic map indicates structure conducive to localization of precious metals as resembles structures in known precious mineral areas. Also, the geologic map is permissive of an extension of the structure to depth. Any deep potential will have to be prospected by drilling to prove or disprove ore potential. Until such drilling is done the Lazy Doc lode remains a valid gold occurrence with ore potential.

Such newly offered evidence may not be considered on appeal except with reference to whether the hearing should be reopened. E.g., United States v. McKenzie, 20 IBLA 38 (1975). Since the new evidence would show that the quantity of the ore remains to be discovered, the offered evidence is not sufficient to justify reopening the hearing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Joseph W. Goss
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

While I have no quarrel with the conclusions reached in the case that (1) no discovery of a valuable mineral has been demonstrated, (2) the patent application was properly rejected, and (3) that consequently the decision of the Administrative Law Judge is properly affirmed, I question the applicability of a certain concept enunciated in the decision below and cited in the main opinion.

On page three of his decision, the Administrative Law Judge stated:

> The Contestee or his lessees have been on the claim since 1946 and the work performed during this period of more than 30 years is substantial, but there has been no processing or sale of any ore. Such mineral as has been removed has been left on or near the claim. Clearly, there has been ample time for the development of a mine. What persons have done is much more persu[a]sive evidence than what a witness is willing to state that a prudent man would do. United States v. Flurry, A-30887 (March 5, 1968). [Emphasis in original].

I recognize that earlier decisions of the Board have recited that a failure to develop minerals or to do anything to develop a mining claim may raise a presumption of lack of discovery. See, e.g., United States v. Stewart, 5 IBLA 39, 79 I.D. 27 (1972). That was a sand and gravel case.

The case at bar involves gold. We cannot adopt a prismatic view and ignore the fact that precious metals have had a huge increase in values in recent years. In 1946, gold was worth some $35 an ounce, in contradistinction to some $600 + per ounce recently.

In retrospect, a prudent man might well have refrained from 1946 to the present from developing a gold deposit. The rationale for the presumption in sand and gravel cases dissipates when applied to the case at bar.

Frederick Fishman
Administrative Judge